an implied agreement to submit to Ghanaian jurisdiction because (a) the proper law of the contract of marine insurance was that of Ghana, and (b) the marginal claims payable clause provided for performance within that jurisdiction. Logically, the first question arising under the submission of the plaintiffs is whether the words in section 9(2)(b) "or otherwise submit or agree to submit to the jurisdiction of that court" are wide enough to include an implied submission or agreement to submit. Mr. Mustill argued that they were intended to apply only to express submission or agreements such as are, for example, dealt with in Order 11, r.2 (formerly r.2A) of the Rules of the Supreme Court. I do not, however, see any ground on which I am obliged to give the words of the statute such a limited application and hold that an implied submission or agreement to submit can satisfy the words used."

The conclusion of Diplock J. in *Blohn's* case, that a partner in an Austrian firm who was resident in England took no part in the conduct of the business would be held implied to have agreed to submit to the jurisdiction of the Austrian Court, has been strongly criticised and was rejected by Ashworth J. in *Vogel* v. *R & A Kohnstamm, Ltd.*[4] It was held that an agreement to assent to the jurisdiction of a foreign tribunal could not be implied but must be made expressly. The learned Judge in the course of his judgment referred to *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* and *Emanuel* v. *Symon (supra)* and he said (p. 1439):

"Those two cases in my view establish the principle that an implied agreement to assent to the jurisdiction of a foreign tribunal is not something which courts of this country have entertained as a legal possibility. Recognising that such an agreement may be made expressly they have in terms decided that implication is not to be relied on."

I am personally of the view that an agreement to submit to the jurisdiction of a foreign tribunal cannot be implied but must be made expressly. In the present case the Debtor has not expressly submitted to the jurisdiction of the original court.

Counsel for the Creditor contends that the Debtor is carrying on business within the jurisdiction of the original court and that this is sufficient to found jurisdiction under the Act. But is the Debtor in fact carrying on business in Hong Kong? True she is a director and shareholder of the said Company. But she is a non-active director. She has no office or place of business in Hong Kong and she is not resident in Hong Kong. I find that she is not carrying on business in Hong Kong.

Was the Debtor duly served with the process of the original court? I find that she was not. The Creditor has in fact not complied with the Rules of the Supreme Court of Hong Kong. Before the Creditor can serve the writ on the Debtor in the manner provided for by Order 10 Rule 1(2)(b), the Debtor must be within the jurisdiction of the original court. The evidence clearly is that the Debtor was not within the jurisdiction of the original court at the time the writ was purported to be served on the Debtor under Order 10 Rule 1(2)(b). The service is therefore bad.

In the result, the Debtor succeeds in her application. I order that the registration of the said Judgment be set aside; and the costs of this application be taxed and paid by the Creditor.

Application allowed.

Solicitors: *Rodyk & Davidson; Khor Thiam Beng & Partners.*

RE S.Q. WONG HOLDINGS (PTE.) LTD.

[O.C.J. (Chan Sek Keong J.C.) May 28, 1987]

[Singapore – Originating Petition No. 66 of 1986]

Company Law – Directors – Duties and powers – Whether exercised in manner oppressive to members' interests – Scope of Companies Act (Cap. 50, 1985 Ed.), s. 216(1)(a) & (b).

Company Law – Shares – Ordinary and preference shares distinguished – Refusal to pay preferential dividends – Whether affairs of company conducted in oppressive manner – Companies Act (Cap. 50, 1985 Ed.), s. 216(1)(a) & (b).

The company in this case was incorporated by Dato S.Q. Wong, a wealthy man on May 18, 1973. The nominal capital was $100,000 divided into 100,000 shares of $1.00 each.

On March 31, 1976, Dato Wong owned all the issued preference shares (90,002) and the children and grandchildren together owned all the issued ordinary shares (48) of the company.

On July 1, 1978, Dato Wong made his last will and testament whereby he appointed Hongkong and Shanghai Bank (Singapore) Trustee Ltd. as the sole executor and trustee and he bequeathed his residuary estate to Mabel Hudson (which included the 90,002 preference shares).

On July 8, 1978, Dato Wong in exercise of his powers as Governing Director removed Alan Wong and Joyce Liu as directors and appointed WPT, Mabel Hudson and WPY as directors with WPT as his deputy.

Dato Wong died on October 11, 1980, and WPT succeeded to the position of Governing Director of the Company. On October 20, 1980, WPT ceased to be the Governing Director when he resigned as a director.

On February 4, 1983, the Hongkong and Shanghai Bank (Singapore) Trustee Ltd. was granted probate of the will of Dato Wong. The Grant of Probate was not extracted, the 90,002 preference shares remained registered in the name of Dato Wong until September 14, 1985.

On July 31, 1985, the petitioners requisitioned the extraordinary general meeting of the company with a view to removing Mabel Hudson and Benjamin Wong as directors and appointing Joyce Liu and Wong Hong Ching in their place.

The petitioners contended that (a) the 90,002 preference shares could not be voted as they were not registered in the name of Mabel Hudson; (b) as directors, Mabel Hudson and Benjamin Wong ought to have paid the accumulated dividend on those preference shares; (c) they deliberately withheld doing so in breach of the Articles of Association with the collateral purpose of ensuring that the preference shares had voting rights and using such rights to defeat the voting rights of the majority of the ordinary shares held by the petitioners; and (d) therefore the affairs or the powers of the directors are being exercised in a manner oppressive to one or more of the members or in disregard of his interests as members in terms of section 216(1)(a) of the Companies Act (Cap. 50, 1985 Ed.) or that some act of the company has been done or is threatened which is prejudicial to one or more of the members in terms of section 216(1)(b) of the Act. The respondents denied allegations of oppression and said that they had managed the company well and had paid dividends on the ordinary shares.

Held, allowing the petition: (1) in law, the directors have a discretion whether or not to recommend a dividend, even on the preference shares, but this discretion must be exercised fairly and honestly in the interest of the company. They would not be acting honestly or fairly if the discretion were exercised to deny the preferential shareholders their rights for a collateral purpose;

(2) the respondents as directors by paying (the interim dividends) and recommending the payment of the final dividends on the ordinary shares and the respondents in their capacity as shareholders by resolving to do so but at the same time failing or refusing to do the same on the preferential shares have reversed the order of priorities contrary to Article 5 of the Articles of Association;

(3) the respondents had also used Article 5 to entrench themselves in permanent control contrary to the whole purpose of Article 5;

(4) the deprivation or attempted deprivation of majority control by directors out of self interest or for personal advantage is the classic form of oppression;

(5) the petitioners have made out a case of oppression under section 216(1)(a) of the Companies Act in that the affairs of the company were being conducted or the powers of the directors were being exercised in a manner oppressive to the petitioners as members or in disregard of their interests as shareholders;

(6)(a) the company must forthwith pay all unpaid dividends payable on the cumulative preference shares of the company.

(b) the directors must convene within 7 days from the date of judgment an Extraordinary General Meeting of the company to be held not later than 21 days therefrom for the election of new directors.

(c) the respondents were to continue as directors until the date of the Extraordinary General Meeting of the company.

(d) costs of the petition to be paid by the respondents to the petitioners.

(e) both parties were to have liberty to apply.

[*Editorial Note:* An appeal has been lodged against the court's decision in this case.]

Cases referred to:

(1) *Burland* v. *Earle* [1902] A.C. 83.
(2) *Re Kong Thai Sawmill Sdn. Bhd.* [1978] 2 M.L.J. 227, 229.
(3) *Greenhalgh* v. *Arderne Cinemas Ltd.* [1946] 1 All E.R. 512.
(4) *Clemens* v. *Clemens Brothers Ltd.* [1976] 2 All E.R. 268.
(5) *Re Chi Liung & Son Ltd.* [1968] 1 M.L.J. 97.
(6) *Australian Metropolitan Life Assurance Co. Ltd.* v. *Ure* (1923) 33 C.L.R. 199, 217.
(7) *Howard Smith Ltd.* v. *Ampol Ltd.* [1974] A.C. 821.

PETITION.

Davinder Singh for the petitioners.
Leslie Chew for the respondents.

Cur. Adv. Vult.

Chan Sek Keong J.C.: Dato S.Q. Wong (the deceased) was a wealthy man on May 18, 1973, when he caused to be incorporated a company called S.Q. Wong Holdings (Private) Ltd. as his family holding company to hold all his assets. The nominal capital was $100,000 divided into 100,000 shares of $1.00 each. Two subscriber shares were issued, one each to two sons *viz.* Wong Peng Tuck ("WPT") and Wong Peng Onn ("WPO").

The first directors were Dato Wong and WPT. Dato Wong was also appointed by the Articles of Association as the Governing Director for life with powers to (a) determine the amount of his own remuneration from time to time; (b) exercise all the powers, authorities and discretions which by the Articles of Association or the Companies Act are vested in directors generally; (c) to appoint a deputy director and other directors and to remove them; and (d) to veto any board resolution.

On May 2, 1974, the directors of the company resolved to accept the offer of Dato Wong to sell to the company all his securities and properties as

set out in the Board resolution for $8,763,704, the consideration to be paid as and when Dato Wong made a request for payment. No evidence was given as to the date when this transaction was completed.

At a general meeting of the members on March 1, 1976, Article 5 of the Articles of Association was deleted and a new Article 5 was substituted therefor as follows:

"The capital of the Company is $100,000 divided into 90,002 Cumulative Preference Shares of $1/– each and 9,998 Ordinary Shares of $1/– each. The Cumulative Preference Shares shall confer on the holders thereof the following rights and privileges and be subject to the following conditions that is to say –

(i) The right to receive out of the profits of the Company and as a first charge thereon a fixed Cumulative Preferential Dividend at the rate of 6% per annum payable yearly on the amount for the time being paid up thereon calculated from January 1, 1976. Such Cumulative Preference Shares shall rank both in regard to dividend and return of capital in priority to all other shares for the time being of the Company.

(ii) The right to receive notice of General Meetings, copies of such Reports, Profit and Loss Accounts and Balance Sheets (including every document required by law to be attached thereto) as are required by law to be laid before the Company in General Meeting, and to attend and vote at General Meetings (either in person or by proxy, who need not be a member of the Company) during the lifetime of Dato S.Q. Wong, but as from and after the death of the said Dato S.Q. Wong, the holders of the Cumulative Preference Shares shall by virtue or in respect of their holding of Cumulative Preferential Shares only have such rights if the fixed Cumulative Preferential Dividend should remain unpaid for six months after any yearly date fixed for payment thereof or if a resolution is proposed affecting the rights or privileges of the holders of the said shares.

(iii) Upon the winding up of the Company the right to payment of all capital paid up on the Cumulative Preference Shares and of all arrears of dividend (whether earned or declared or not up to the date of the commencement of the winding up) in priority to all other shares. The holders of such Cumulative Preference Shares shall not be entitled to any participation in the Company's profits or assets other than to the extent expressly provided for in sub-paragraph (i) hereof and in this sub-paragraph.

(iv) Except with the consent of the holders of not less than ¾ths of the issued Cumulative Preference Shares no further shares shall be issued by the Company ranking prior to or *pari passu* with the abovementioned Cumulative Preference Shares nor shall the capital of the Company be reduced, nor the rights and privileges of the holders of such shares be altered without such consent."

At the same meeting, the company pursuant to Article 7, resolved to convert the 90,002 ordinary shares of $1.00 each into cumulative preference shares with the rights and privileges as set out in new Article 5.

On March 31, 1976, the directors met and authorised the cancellation of the two certificates for the subscriber shares and the issue of:

(A) the following cumulative preference shares of $1.00 each ("the preference shares"):

(1) 90,000 to Dato Wong;

(2) one each to WPT and WPO (who immediately transferred the same to Dato Wong);

(B) the following 48 ordinary shares of $1.00 each at a premium of $99 per share:

(1) 5 to each of WPT's sons *viz.* Wong Hong Sun and Wong Hong Yen;

(2) 5 to each of WPO's children *viz.* Wong Hong Ching and Wong Pui Ying;

(3) 10 to P Y Wong (Benjamin Wong);

(4) 5 to Alan Wong Hong Yat;

(5) 5 to Wong Peng Fun;

(6) 2 to Mabel Wong (now known as Mrs. Mabel Hudson);

(7) 2 to Mrs. Peggy Yuhung Lee;

(8) 2 to Mrs. Joyce Yuling Liu;

(9) 2 to Mrs. Nellie Svasti;

Thus on March 31, 1976, Dato Wong owned all the issued preference shares (90,002) and the children and grandchildren together owned all the issued ordinary shares (48) of the company. Although the board resolutions did not refer to a premium, the audited accounts of the company for the financial year ended 1978 showed that the preference shares were also issued at a premium of $99.00 each.

Between 1977 and 1985, the relevant events which occurred in relation to the family and the company were as follows:

(1) On May 5, 1977, at the first annual general meeting of the company, when Dato Wong was absent, Joyce Liu, Peggy Yuling Lee and Nellie Svasti raised queries on the accounts of the company.

(2) On July 1, 1978, Dato Wong made his last

will and testament whereby he appointed the Hongkong & Shanghai Bank (Singapore) Trustee Ltd as the sole executor and trustee and after directing for payment of his debts and funeral expenses he devised and bequeathed his residuary estate to Mabel Hudson (which included the 90,002 preference shares).

(3) On July 8, 1978, Dato Wong in exercise of his powers as Governing Director removed Alan Wong and Joyce Liu as directors and appointed WPT, Mabel Hudson and Benjamin Wong as directors with WPT as his deputy.

(4) On July 29, 1978, the new directors authorised any two of Dato Wong, WPT, Benjamin Wong and WPO as the company's bank signatories for its accounts with the Chartered Bank, Singapore and the Hong Kong & Shanghai Bank, Johore Bahru.

(5) Dato Wong died on October 11, 1980.

(6) On October 11, 1980, WPT succeeded to the position of Governing Director of the company by virtue of Article 70a of the Articles of Association of the company.

(7) On October 20, 1980, WPT ceased to be the Governing Director when he resigned as a director and left Singapore.

(8) On February 4, 1983, the Hongkong & Shanghai Bank (Singapore) Trustee Ltd. was granted probate of the Will of Dato Wong in Probate No. 69 of 1983. The Grant of Probate was not extracted, the 90,002 preference shares, remained registered in the name of Dato Wong until September 14, 1985.

(9) On September 7, 1983, WPT became a shareholder of 5 shares when he registered in his name a transfer of 5 shares purportedly signed by Wong Peng Fun. The latter commenced proceedings in Suit No. 5146 of 1983 to recover these shares, the interest in which he subsequently transferred to Joyce Liu.

(10) Pursuant to an Order of Court made on May 3, 1985, Joyce Liu was substituted as the lawful beneficial owner of the 5 shares registered in WPT's name.

(11) On July 31, 1985, Joyce Liu, Wong Hong Ching and Wong Pui Ying requisitioned for an extraordinary general meeting of the company with a view to removing Mabel Hudson and Benjamin Wong as directors and appointing Joyce Liu and Wong Hong Ching in their place. At that time (and up to the date of this hearing), the directors of the company were Mabel Hudson and Benjamin Wong.

(12) Upon the failure of the said directors to convene the extraordinary general meeting, the said requisitionists on September 4, 1985 convened an extraordinary general meeting to be held for September 21, 1985 for the intended purposes.

(13) On September 9, the executor obtained from the Commissioner of Estate Duties, Singapore, a certificate of postponement of estate duty and on September 10, 1985 extracted the Grant of Probate.

(14) On September 14, 1985, the 90,002 preference shares were registered in the name of Mabel Hudson.

(15) On September 21, 1985, the extraordinary general meeting was duly held and a dispute arose as to whether the 90,002 preference shares had voting rights. Eventually, on the advice of their respective solicitors, the parties agreed to vote on the resolutions on two bases: (1) with the inclusion of the 90,002 preference shares and (2) with the exclusion of the 90,002 shares. On the first basis, the resolutions were defeated 26:90,024. On the second basis, the resolutions were carried 26:22. No action has been taken by either side to determine which was the lawful result.

(16) On March 29, 1986, Mabel Hudson transferred 10,000 preference shares to Benjamin Wong.

On October 6, 1986, the petitioners, *viz.* Joyce Liu, Wong Hong Ching, Wong Pui Ying, Alan Wong Hong Yat, Peggy Yuhung Lee and Nellie Svasti filed this petition alleging, *inter alia*, in paragraph 24 that

"Mabel Hudson and Benjamin Wong have exercised their powers as directors in a manner which completely disregards the interest of Your Petitioners and which unfairly discriminates and is prejudicial to them. These powers are being abused by these 2 directors to further their personal interests which are not consistent with those of the Company and the other shareholders. Unless this Honourable

Court orders otherwise, the present state of affairs will be perpetuated with the result that irrespective of the intention of Dato Wong, the express terms of the Articles of Associations and the general law and practice relating to companies, Mabel Hudson and Benjamin Wong will be permitted to wrongfully entrench themselves as directors despite the fact that they are only minority shareholders holding ordinary shares and contrary to the express wishes of the majority shareholders of ordinary shares."

When the matter came on for hearing, counsel for the petitioners based his case on the conduct of the respondents beginning from August 1985 when they received the requisition for an extraordinary general meeting of the company.

The complaint of the petitioners was put as follows: when three of them requisitioned the extraordinary general meeting on July 31, 1985, the 90,002 preference shares could not be voted as they were not registered in the name of Mabel Hudson, that she got these shares registered in her name with undue haste on September 14, 1985, for the sole purpose of ensuring that she and Benjamin Wong would not be removed as directors; that as directors, she and Benjamin Wong ought to have paid the accumulated dividend on those preference shares, that they deliberately withheld doing so in breach of the Articles of Association with the collateral purpose of ensuring that the preference shares had voting rights and using such rights to defeat the voting rights of the majority of the ordinary shares held by the petitioners and that therefore the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or in disregard of his interests as members in terms of section 216(1)(a) of the Companies Act (Cap. 50, 1985 Ed.) or that some act of the company has been done or is threatened which is prejudicial to one or more of the members in terms of section 216(1)(b) of the said Act.

That, as summarised above, is the case for the petitioners. Before I deal with the case for the respondents *viz.* Mabel Hudson and Benjamin Wong, and the evidence, I should set out the undisputed facts on the financial condition of the company and the practice of the company on the payment of dividends on the preference shares as well as the ordinary shares and other related matters during the period prior to the death of Dato Wong. First, the company was profitable since its incorporation. It had to be since it was an investment holding company which got all its assets in exchange for its own shares. Up to the financial year ended December 31, 1981, the company had retained profits amounting to $3,148,477. During the lifetime of Dato Wong, no dividend was declared or paid on any of the preference shares or the ordinary shares. In 1978 and 1979, Dato Wong's personal living expenses were advanced by the company for his account. The accumulated amount so advanced up to his death was $127,585. This amount was, according to counsel for the company, written off by the company after the death of Dato Wong. The petitioners have disputed the propriety of writing off this amount in the circumstances of this case. The audited accounts for 1980 showed that the amount of dividend on the preference shares were $16,201. The dividend on these shares payable for each of 1981 to 1985 was $3,240 per year whilst the amount payable for 1985 was $5,427 (as a result of the tax rate falling to 33% from 40%). Thus the amount owing on the preference shares at the date of the hearing was approximately $37,828.00 of which $16,201.00 was due when Dato Wong was alive and the balance was due after his death.

A change of policy took place after the death of Dato Wong, when the company began to pay dividends on the ordinary shares. Dividends were paid twice in each of 1982, 1983, 1984 and 1986. The dividends paid on each share on the six occasions in 1982 to 1984 was S$5,000 per share whilst the amounts paid in 1986 were M$6,000 and M$9,000 per share. The total dividend paid, less tax, up to 1986 was therefore S$864,000 and M$432,000.

On all these facts and the interpretation thereof by the respondents, the respondents say that the affairs of the company are not being conducted nor have they acted oppressively nor have the company done anything or threatened to do anything to prejudice the interests of the petitioners. They say they have managed the company well and have paid handsome dividends on the ordinary shares which have benefited the petitioners equally with themselves. As for continuing to exercise control of the management of the company through the exercise of the voting rights conferred on the preference shares, the respondents say that by not paying the dividends payable on the preference shares, they were merely following the practice of Dato Wong in not paying them; that Dato Wong by his conduct had signified an intention that they should control the company in the interest of his children and grandchildren *i.e.* (1) by his bequeathing all the preference shares to Mabel Hudson in his will, (2) by removing Joyce Liu and Alan Wong as directors in 1978, and that by not paying the preferential dividends, the direc-

tors were in effect carrying out the intention of Dato Wong that the respondents should continue to control the company.

Counsel for the respondents gave a further reason for not paying the accumulated dividends on the preference shares, which was that in line with

'the primary purpose of the Company, *i.e.* to hold assets for the children and grand children of Dato Wong, ... instead of dissipating the assets by paying out from the profits of the Company dividends on the Preference Shares, the respondents have in exercise of their discretion as Directors put to reserve large amounts of the profits of the Company."

In my view, this was a hopeless argument on the facts and gave the impression that the respondents were clutching at straws. First, the audited accounts for 1978 up to 1984 did not provide for any reserves at all. Secondly, the amount of $37,828 was only a fraction of the dividends paid out on the ordinary shares. Thirdly, this is an investment holding company and no reason was suggested why reserves were necessary.

Counsel for the respondents further submitted: (a) that the declaration of dividends is a management decision within the discretion of the directors and that any decision by them in this regard should not be questioned in Court: *Burland* v. *Earle*[1]; (b) that a shareholder may exercise his voting rights as he pleases and that in so doing he owes no duty whatever to the other shareholders; (c) that furthermore, the Privy Council decision in *Re Kong Thai Sawmill Sdn. Bhd.*[2] shows that for the conduct of the respondents to come within the scope of section 216 of the Companies Act, it is not sufficient that those managing the company and possessing a majority of the voting power make policy or executive decisions which the petitioners disagree; it was suggested that that is precisely the case here; (d) that for the petitioners to come within section 216(1)(a) of the Act, they must prove a course of conduct, and not merely a single act, which in some identifiable aspect can be held to have been in disregard of the interest of the petitioners and that what they have proved is the mere non-declaration of the preferential dividends.

It is plain to me that all the actions and omissions of the respondents complained of by the petitioners at the hearing of this petition were, taken singly or collectively, carried out for the sole purpose of ensuring that the preference shares should retain their voting rights so as to prevent the petitioners from ousting them as directors of the company. First, the respondents were in breach of their statutory duty when they refused to convene the extraordinary general meeting lawfully requisitioned by three of the petitioners on July 31, 1985. The reason for the refusal was plain. It was to gain time for the issue of the Grant of Probate so that the preferential shares could be transferred to Mabel Hudson so that she could use the voting rights incidental to these shares to vote against the proposed resolutions of the requisitionists. This move succeeded in its objective. Secondly, the respondents, both as directors and preferential shareholders have thereafter continued to refuse to effect payment of preferential dividends for no reason other than to retain management control. Thirdly, Mabel Hudson transferred 10,000 preference shares to Benjamin Wong on March 29, 1986, again, in my view, for no reason other than to ensure continuity of management control in case one or other of their shares are not available for voting at the appropriate time. Fourthly, Mabel Hudson, when she was cross-examined, admitted that even if the directors agreed to recommend (which they did not) the payment of the cumulative dividends on the preference shares, she, as a preference shareholder, would, for the purpose of retaining the control she believed she is entitled, vote against the declaration and payment of the said dividends. The refusal to pay the unpaid dividends on the preference shares continues to be dictated solely by the desire of the respondents to retain management control. It may, of course, be said in mitigation that there is an element of self-sacrifice in the respondents continuing to deprive themselves of the immediate use of the preferential dividends, but this altruism pales in comparison with the self-interest in retaining management control of a company which had more than $11 million in net assets at the end of 1984.

Was this course of conduct or some of any of such acts or omissions oppressive to or in disregard of the interests of one or more members in terms of section 216(1)(a) or prejudicial to one or more members under section 216(1)(b) of the Companies Act? To answer this question, it is necessary to understand the nature and function of preferential shares and to examine the Articles of Association of the company to determine whether the nature and function of such shares have been altered in any way which could justify the respondents making use of the preference shares in the manner they have done.

The law recognises two basic types of shareholdings in a company, *i.e.* ordinary shares (sometimes called "equity shares") and preferential shares – see the definitions of "equity share" and "preference share" in section 4 of the Companies Act; and in so doing gives recognition to commercial reality. Preference shares, as their name implies, carry preferential rights in relation to ordinary shares (unless otherwise prescribed) in respect of dividend on a cumulative basis and return of capital on winding up. Some of them even carry rights of participation in profits beyond their fixed dividends. In recent years, the courts have given recognition to the commercial reality in the treatment of these shares. From a financial point of view, ordinary shares represent risk capital whereas preferential shares represent something more akin to loan capital. As, functionally, loan capital should be repaid before risk capital, ordinary shareholders bear a higher risk and are therefore expected to and are normally entitled to have voting rights which secure them management control. Preference shares are given voting rights only to the extent to which the rights incidental to such shares are or become affected by the financial condition of the company or the acts of the other shareholders (see section 180(2) of the Companies Act). They are, of course, different types of preference shares, *e.g.* those which have the right to participate in the profits of the company and also ordinary shares some of which have more voting rights than others or which do not have voting rights (*e.g.* in England, but not in Singapore) but these variations do not affect the fundamental division of share capital.

This is a case where the respondents have managed to obtain and retain control by virtue of their preference shareholdings in the company. This is an inversion of the normal relationship between equity capital and loan capital and is contrary to both the principle and practice of corporate enterprise. This situation is therefore, *prima facie*, wrong but if it is right, it can only be by virtue of the Articles of Association of the company in expressly or impliedly providing for or permitting such a relationship

I now turn to Article 5 of the Articles of Association of the company. Article 5(ii) confers on the holders of the preference shares, *inter alia*, the right to attend and vote at General Meetings during the lifetime of S.Q. Wong, but as from and after his death, such holders will "only have such rights if the fixed cumulative preferential dividend should remain unpaid for 6 months after any yearly date fixed for payment thereof ..."

In this case, it is not disputed that the dividend on the preferential shares has been unpaid for six months after due date (see section 180(3) of the Companies Act). It may well be (but it does not arise here) that if in any particular case the preferential shareholders themselves were to voluntarily request the directors or the shareholders to omit payment of their dividend, no question of impropriety can arise with regard to any accession by the directors to this request. But the question that still has to be answered in such a situation would be whether the preferential dividends could be said to be "unpaid" for the purpose of the Article.

The purpose of Article 5(ii) is clear. Dato Wong had intended to control the company during his lifetime as a preference shareholder whether or not the preference dividends remained unpaid. He founded the company. He provided the assets. He could do what he liked and he did it by conferring upon himself unconditional voting rights as a preference shareholder, unconventional though it was in terms of corporate practice. He had no need of the annual dividend as whatever he needed for his expenses could be and were advanced by the company. He was more interested in having control than in having the dividends. However, he did not wish to give the same rights in respect of the preference shares to his successor in title after his death. Such successor or successors would have voting rights only and only when no dividend has been paid for six months or more on such shares.

In ordinary circumstances, a preference shareholder in a company expects a company to pay the contracted dividend on his shares in accordance with the contract amongst the shareholders as set out in its Articles of Association. The directors are expected to act honestly and diligently in taking the necessary steps to effect payment of such dividend where the financial condition of the company does not justify a refusal to pay. In law, the directors have a discretion whether or not to recommend a dividend, even on the preference shares, but this discretion must be exercised fairly and honestly in the interest of the company. They would not be acting honestly or fairly if the discretion were exercised to deny the preferential shareholders their rights for a collateral purpose.

Article 5 was never intended to enable the

holders of the preference shares, other than Dato Wong, to assume control in order not to pay the cumulative fixed dividends accrued and accruing to them in order to maintain control of the company. The intention of Article 5(ii) was not to give permanent control of the company to such shareholders but to give them control for the purpose of correcting any circumstance or situation (*e.g.* an inability to pay the dividends for lack of profits or some other reason) which may have resulted in the non-payment of the cumulative dividends, and, if that cannot be done without further prejudice to their rights as preference shareholder, to wind up the company in order to salvage what there is by way of return of their capital in the company.

In the present case, the respondents as shareholders have deliberately made use of Article 5 for a purpose for which it was never intended. The effect of the respondents' conduct was to deprive the petitioners as the majority ordinary shareholders of their ordinary right to management control. The respondents acted purely out of self-interest and nothing more (tempered only to the extent that they were under the mistaken belief that Dato Wong, by his acts, had intended that the respondents should remain in control of the company and that such intention could affect the meaning and effect of the Article 5(ii)).

In *Greenhalgh* v. *Arderne Cinemas Ltd.*[3] Evershed M.R. said:

> "Certain things, I think, can be safely stated as emerging from those authorities. In the first place, it is now plain that '*bona fide* for the benefit of the company as a whole' means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of the company as a whole. Secondly, the phrase, 'the company as whole,' does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the corporators. It means the corporators as a general body. That is to say, you may take the case of an individual hypothetical member and ask whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit."

Applying the test laid down by Evershed M.R., it is clear that the respondents have not honestly acted in the interest of the corporators as a general body.

The argument of counsel for the respondents that a shareholder is entitled to exercise his voting rights in whatever manner he thinks fit can be disposed of by reference to the case of *Clemens* v. *Clemens Bros. Ltd.*[4] In that case, the plaintiff held 45 per cent and her aunt held 55 per cent of the issued share capital of a family company consisting of 200 preference shares, of which the plaintiff and the aunt each held 100 shares and 1800 ordinary shares of which the plaintiff held 800 and the aunt 1000. The company's articles contained a pre-emption clause in favour of members. The aunt was a director but the plaintiff was not. There were four other directors. The total directors' emoluments exceeded the company's net profits before taxation in each of the years 1971 to 1974. The directors proposed to increase the company's share capital from £2000 to £3650 by the creation of a further 1650 ordinary shares with voting rights, 200 of which would be allotted to the directors (other than the aunt) and the balance of 850 shares would be placed in trust for the company's employees. The plaintiff opposed the resolutions for this scheme but they were passed at a shareholders meeting at which the aunt voted in favour. The plaintiff brought an action against the company and the aunt seeking a declaration that the resolutions were oppressive of the plaintiff and an order setting them aside. The aunt contended that, if two shareholders both honestly held different opinions, the view of the majority should prevail, and that shareholders in general meeting were entitled to consider their own interest and to vote in any way they honestly believed proper in the interests of the company. Foster J. held that the aunt was not entitled as of right to exercise her majority votes as an ordinary shareholder in any way she pleased; her right was subject to equitable considerations which might make it unjust to exercise it in a particular way. The learned Judge found that the resolutions had been framed in order to put complete control of the company into the hands of the aunt and her fellow directors, to deprive the plaintiff of her existing rights as a shareholder with more than 25 per cent of the votes and to ensure that she would never get control of the company and held that these considerations were sufficient in equity to prevent the aunt using her votes as she liked, and the resolutions were accordingly set aside as being oppressive.

In my view, the principle enunciated by Foster J. applies to the conduct of Mabel Hudson and also that of Benjamin Wong, if his intention has been also to vote his preference shares to block the payment of dividend on the said shares. They should not use the preference shares to maintain control but, where the circumstances are appropriate, to discontinue control in accordance with the purpose of Article 5. The circumstances here

were appropriate as there is no question of the company not having made sufficient profits in each year to pay the preferential dividends. There was and continues to be, in this case, "a visible departure from the standards of fair dealing and a violation of fair play" which the petitioners were entitled to expect from the respondents: see *Re Kong Thai Sawmill (Miri) Sdn Bhd (supra).*

In the present case, the respondents as directors have also deliberately exercised their powers contrary to the purpose of Article 5 and as directors have acted in breach of their obligations in two respects. First, the preference shares rank in regard to dividend in priority to the ordinary shares. The directors by paying (the interim dividends) and recommending the payment of the final dividends on the ordinary shares and the respondents in their capacity as shareholders by resolving to do so but at the same time by failing or refusing to do the same on the preferential shares have reversed the order of priorities contrary to Article 5. Secondly, by the same acts, the respondents have used Article 5 to entrench themselves in permanent control contrary to the whole purpose of Article 5. An act in breach of the Articles of Association of the company may amount to oppression: *Re Chi Liung & Son Ltd.*[5] when the motive for not acting in accordance with the Articles is in order to deprive the majority ordinary shareholders of their rights. The directors of a company are under a duty to exercise their corporate powers *"bona fide"* – that is, for the sole purpose for which it was conferred, not arbitrarily or at the absolute will of the directors, but honestly in the interest of the shareholders as a whole": Isaacs J. in *Australian Metropolitan Life Assurance Co. Ltd.* v. *Ure.*[6]

The deprivation or attempted deprivation of majority control by directors out of self-interest or for personal advantage is the classic form of oppression. In *Howard Smith Ltd.* v. *Ampol Ltd.*,[7] the Privy Council had this to say, in a case where the directors' attempt to deprive the majority shareholders of control was not activated by any purpose of personal gain or advantage or by a desire to retain their position on the board (at p. 834):

"It can be accepted, as one would only expect, that the majority of cases in which issues of shares are challenged in the courts are cases in which the vitiating element is the self-interest of the directors, or at least the purpose of the directors to preserve their own control of the management: see *Fraser* v. *Whalley* (1864) 2 Hem. & M. 10; *Punt* v. *Symons & Co. Ltd.* [1903] 2 Ch. 506; *Piercy* v. *S. Mills & Co. Ltd.* [1920] 1 Ch. 77; *Ngurli Ltd.* v. *McCann* (1953) 90 C.L.R. 425 and *Hogg* v. *Cramphorn Ltd.* [1967] Ch. 254, 267.

Further it is correct to say that where the self-interest of the directors is involved, they will not be permitted to assert that their action was *bona fide* thought to be, or was, in the interest of the company; pleas to this effect have invariably been rejected (e.g. *Fraser* v. *Whalley*, 2 Hem. & M. 10 and *Hogg* v. *Cramphorn Ltd.* [1967] Ch. 254) – just as trustees who buy trust property are not permitted to assert that they paid a good price.

But it does not follow from this, as the appellants assert, that the absence of any element of self-interest is enough to make an issue valid. Self-interest is only one, though no doubt the commonest, instance of improper motive: and, before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made. This is recognised in several well-known statements of the law. Their Lordships quote the clearest which has so often been cited:

> 'Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason.' (*Hindle* v. *John Cotton Ltd.* (1919) 56 Sc.L.R. 625, 630-631, per Viscount Finlay.)"

In the circumstances, I find that the petitioners have made out a case of oppression under section 216(1)(a) of the Companies Act in that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to the petitioners as members or in disregard of their interests as shareholders. I also find that Mabel Hudson's refusal to use her preferential shares to vote against any proposed resolution to pay the preferential dividends is a threat to the company (because she holds the greater majority of voting rights) which is prejudicial to the rights of the petitioners under section 216(1)(b) of the Companies Act.

With a view to remedying the matters complained of, I make the following orders:

1. That the company forthwith pay all unpaid dividends payable on the cumulative preference shares of the company.

2. That the directors convene within 7 days from the date hereof an Extraordinary General Meeting of the company to be held not later than 21

days therefrom for the election of new directors.

3. That the respondents continue as directors until the date of the Extraordinary General Meeting of the company.
4. The petitioners shall have the costs of this petition to be paid by the respondents.
5. The petitioners and the respondents to have liberty to apply.

Petition granted.

Solicitors: *Drew & Napier; Khattar Wong & Partners.*

OP 66/86
S/C 3820/87

Application For an Order to suspend/stay Order of Court dated 28/5/87

That in the event that the petitioners or some of them shall be elected as directors (the "new directors") of the Company in place of the respondents and that, on appeal, the decision of the Court is reversed, the new directors shall thereupon be deemed to have vacated their office and the respondents be deemed to have been reinstated as directors, subject to such other orders as the Court of Appeal may make.

Dated this 4th day of June 1987.

(Chan Sek Keong)
Judicial Commissioner.

SAL LEASING (PTE.) LTD. v. HENDMAYLEX PTE. LTD. & ORS.

[O.C.J. (Thean J.) June 3, 1987]

[Singapore – Suit No. 7126 of 1984]

Practice and Procedure – Stay of execution – Matters that would move Court in granting stay – R.S.C. 1980, O. 45 r. 11 & O. 46 r. 10.

Leasing – Equipment – Repossession of – Valuation – Fair value – Fair market value – Sale of equipment by plaintiffs – Balance owing under lease.

The plaintiffs in this case commenced the present action against the three defendants claiming $78,215.57 owing as at September 11, 1984, and interest thereon. Their claim against the first plaintiff is based on a lease of equipment under which the plaintiffs leased to the first defendant certain equipment. The plaintiffs claimed against the second and third defendants as the guarantors. Judgment in default of appearance was entered against the first defendant on October 25, 1984, in the sum of $78,215.57 with interest.

On November 2, 1984, the plaintiffs repossessed the equipment leased to the defendant, and immediately thereafter instructed valuers to value the equipment. The equipment was valued as follows:

(a) Fair Value –$56,000.00

(b) Fair Market Value – $33,000.00

On February 22, 1985, a substantial payment of $48,483.95 was made to the plaintiffs towards satisfaction of the judgment. In March 1985, the Writ was served on the second and third defendants by way of substituted service.

The equipment was sold on June 21, 1985, and September 23, 1985, respectively, for a total sum of $14,600.00.

On February 12, 1986, the plaintiffs applied for summary judgment against the second and third defendants for $23,534.00 for the alleged balance still due and interest and costs. On April 16, 1986, the first defendant took out an application for an order that the judgment entered against it had been satisfied.

The Deputy Registrar ordered that judgment be entered against the second and third defendants in the sum of $22,352.04 with interest thereon and costs, and that the second and third defendants be given unconditional leave to defend the balance of the claim of $1,182.20. The second and third defendants appealed. No appeal against the dismissal of the first defendant's application was brought. On November 11, 1986, Chua J. allowed the appeal, set aside the judgment for $22,352.04 and gave the second and third defendants unconditional leave to defend the claim for $22,352.04.

On November 14, 1986, the first defendant applied for an order that execution on the judgment entered against it on October 25, 1984 be stayed "pending the determination of the issue whether there is any part of the judgment that still remains unpaid." The Assistant Registrar dismissed this application on November 21, 1986. The first defendant appealed.

Held, allowing the appeal: (1) if no judgment had been entered against the first defendant, then by reason of the various matters that have occurred since the judgment, in particular, unconditional leave being given to the second and third defendants to defend the claim for the balance sum of $23,534.00, no judgment would have been entered against the first defendant for that amount or if a judgment had been entered at that date, there would have been a stay pending the outcome of the resolution of the dispute between the plaintiffs and the second and third defendant;

(2) these matters come within the ambit of Order 45 rule 11 and are matters which would or might have prevented a judgment for the sum of $23,534.00 from being entered or made against the first defendant or would or